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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,
Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF PETITIONER

JAMES K. POLK
Counsel for Petitioner
522 Fifth Avenue
New York 36, N. Y.

Of Counsel:
RICHARD JOYCE SMITH
JULIUS M. JACOBS

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REPLY BRIEF OF PETITIONER

The Government's brief in opposition shows all the more why the petition for a writ of certiorari should be granted.

I

The government's opposition to the petition on the procedural question (G 9-11)[1] is based upon the last sentence in Federal Rule 52(a). Appendix II, p. 12 infra. But

[1] References to the Government's brief are indicated by the letter G and page number.

that sentence is omitted from Court of Claims Rule 48, Appendix I, p. 9, infra. We submit that the omission was not through oversight.

The fact that it was deemed necessary to add this sentence to 52(a) contradicts the government's assertion (G 10) that the phrase "in all actions tried on the facts" is addressed only to actions and does not apply to motions.

The government's partial quotation of this sentence makes it necessary, in order to counteract possible adverse inferences, to briefly touch upon matters which ordinarily are reserved for a brief on the merits.

The first sentence of Federal Rule 52(a), like that of Court of Claims Rule 48, lays down the general rule requiring findings of fact and conclusions of law "in all actions tried upon the facts". The last sentence of 52(a) creates an exception to this general rule—that motions under Rules 12 or 56 do not require such findings. Such exception is understandable because (1) a motion under 56—summary judgment—involves only a question of law, and (2) a motion under 12, Appendix II, p. 11, infra, is addressed to the formalities of pleading or jurisdiction and does not involve a final determination of the facts and merits of the case which would preclude a litigant from further pursuing his asserted rights. That this is the overall design of 52(a) is clearly evidenced by the exception to the exception which the Government omitted from its quotation—"except as provided in Rule 41(b)". Appendix II, p. 11, infra.[18] Nor does the phrase "any other motion" in this last sentence support the implication that the exception to the general rule covers

[18] Similarly, the Government (G 10-11) purporting to answer Petitioner's argument at top of p. 9 of its main brief with respect to Court of Claims Rule 49(c), the counterpart of Federal Rule 41(b), omits any discussion thereon.

all motions, including a motion under 60(b)(6). If that were so, then the specific reference to motions under Rules 12 or 56 would be superfluous. Under the doctrine of *eiusdem generis*, "any other motion" is limited to any other motion like that of Rule 12 or 56, i.e., a motion which involves only a question of law or is not addressed to the facts and merits of the case. This also explains the omission of that last sentence from Court of Claims Rule 48: because motions for summary judgment are fully covered in Court of Claims Rule 51; motions under Federal Rule 12 generally do not apply in Court of Claims suits except a motion for judgment on the pleadings which is covered in Court of Claims Rule 16(c), Appendix I, p. 9, infra; and the applicable provisions of Federal Rule 41(b) are specifically covered in Court of Claims Rule 49(c), Appendix I, p. 9, infra.

Since Court of Claims Rule 48 contains no last sentence exception to the general rule laid down in the first sentence, the Government's claim that 48 does not apply to a motion under 54(b)(6) is contradicted by its own reasoning. Indeed, it is also contradicted by Professor Moore who maintains that the last sentence of 52(a) should be read in conjunction with, and is limited by, the first sentence of that rule. See 5 *Moore*, Federal Practice (2d ed.), par. 52.08, pp. 2670-2674, particularly pp. 2673-2674. The contrary dictum in the *Delzona* case[2] is just an additional reason for the exercise of the supervisory powers of this Court in order to obtain uniformity in the practice and procedure of *all* of the United States Courts.

II

In opposing the petition on the question of clarification of the criteria and guide-lines for the application of 60(b)(6), the Government completely ignores the facts which

[2] *Delzona Corporation* v. *Sacks*, 265 F. 2d 157. A careful reading of the case discloses that the motion, labelled as a motion under 60(b), was really a motion for a new trial of matter already previously decided. Such a motion is not "tried on the facts" and requires no findings.

served as the basis for the motion in the court below[3] and fails to meet the issue presented, namely, whether *all* of those facts, taken together, constitute that "extraordinary" set of facts and circumstances which this Court held, in *Klapprott*,[4] warranted relief under (b)(6). Instead, the Government avoids the applicability of *Klapprott* by referring to the comment of the Advisory Committee that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, and it seizes upon only the last of the facts relied on by petitioner—the decision of this Court in the New York case[5]—to argue that a subsequent change in law is not a basis for vacating a final judgment entered before the change (G 7-8). It then concludes with the statement that "[t]he taxpayer has cited no case in conflict with this principle"[6] (G 8) thus proving that petitioner, by making the motion under subdivision (b)(6) was "attacking a final judgment that had been valid and subsisting for over five years" and that petitioner was showing its "[dis]respect for the finality of judgments [which] has long been a basic principle in our system of jurisprudence" (G 6).

Of course 60(b), or Court of Claims Rule 54(b), does not purport to define the substantive law as to what constitutes (1) mistake, etc., (2) newly discovered evidence, or any of the remaining four categories set forth in the Rule. But this Court *did* define the substantive law— the stand-

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[3] They are neither recited in the Government's statement of facts nor are they referred to in the Government's argument.

[4] *Klapprott* v. *United States*, 335 U. S. 601.

[5] As in the main brief, the "New York case" refers to the suit instituted in the New York District Court which ultimately reached this Court where it was held that the original decision and judgment of the court below was erroneous. *United States* v. *Consolidated Edison Co.*, 366 U. S. 380.

[6] The simple answer to this statement is that the petitioner has never maintained that the mere subsequent change of a rule of law is ground for vacating an erroneous judgment under Rule 60(b)(6); nor is that the basis for the petition herein.

ards, guide-lines and criteria—as to what constitutes "any other reason justifying relief from the operation of the judgment" under (b)(6). (12-16)[7] Yet the Government does not even mention *Klapprott* which is the cornerstone of that substantive law.

Nor does the Government's assertion and constant repetition that the judgment below is final, meet the issue. The Government overlooks the inherent power of our courts, absent statutory enactments to the contrary, to control and correct their own judgments whenever equity and justice require such correction;[8] and it erroneously assumes that a judgment attains the status of absolute finality independently of any court rule or of any established rule of practice and procedure.[9] Moreover, it completely ignores the fact that 60(b)(6) specifically provides for relief from a "final judgment"—one which up to the time a motion is made thereunder has already attained that finality of which the Government speaks.

The Government's misconception of the issue presented by the petition herein is underscored by its argument (G 9) that somehow the fact that petitioner had successfully invoked the principle enunciated in *Commissioner* v. *Sunnen*, 333 U. S. 591, that the judgment of the court below was not *res judicata* of the New York suit, precludes the peti-

[7] References to petitioner's main brief are in parenthesis.

[8] Compare *Cahill* v. *New York, New Haven & Hartford Railroad Co.*, 351 U. S. 183 and *Boudoin* v. *Lykes Bros. Steamship Co.*, 350 U. S. 811 where corrective relief was granted long after the judgment had obtained the finality the Government refers to. "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. * * * Orderly rules of procedure do not require sacrifice of fundamental justice." *Hormel* v. *Helvering*, 312 U. S. 552, 557.

[9] Had Court of Claims Rule 53(e) provided that a motion for a new trial, etc., could be made within six years, instead of 30 days, after entry of judgment, the Government would have to admit that the judgment below could not have attained finality until expiration of the six years.

tioner from maintaining in the present proceeding that in substance, though not in form, the New York case was but a continuation of the single controversy which the court below had erroneously decided in the first instance.

In advancing this argument the Government misreads the *Klapprott* and *Sunnen* decisions and the equitable principles they enunciate. *Klapprott* held that the confining technicalities of common law remedies will not prevent the grant of relief under (b)(6) whenever such action is appropriate to *accomplish justice.* And *Sunnen* held that the common law technicalities of the separability of causes of action will be strictly observed in order to *accomplish justice*. The two cases complement each other and are not in conflict, as the Government implies. In both there is a consistent and purposeful goal of accomplishing justice. Disregard, or recognition, of the common law technicalities is merely the means to that goal. The Government, however, suggests that such technicalities be used in the present case as ends in themselves; that having successfully invoked the equitable principles of *Sunnen* in the New York case and thereby avoided the injustice of perpetuating error through the doctrine of *res judicata*, the petitioner has now, in the context of relief under (b)(6), forfeited the right to invoke the equitable principles of *Klapprott*. It is because of this misconception that nowhere in the Government's brief is any consideration given as to whether, in the light of all the facts and circumstances in this case, it is fair, equitable or just to permit the admittedly erroneous judgment of the court below to remain and to permit the Government to retain the monies it had erroneously collected.

Conclusion

In view of all of the foregoing it is submitted that the Government not only has failed to advance a valid reason why certiorari should not be granted, but also has shown,

by its arguments, the need for the exercise of this Court's power of supervision to obtain uniformity in the practice and procedure of the Court of Claims and of the District Courts, and the need for further clarification by this Court of the guide-lines and criteria in the application of Federal Rule 60(b)(6).

Respectfully submitted,

James K. Polk,
Counsel for Petitioner.
522 Fifth Avenue,
New York 36, N.Y.

Of Counsel:

Richard Joyce Smith,
Julius M. Jacobs.

APPENDIX I

Rules of the United States Court of Claims

RULE 16. DEFENSES AND OBJECTIONS: WHEN AND HOW PRESENTED

* * *

(c) Motion for Judgment on the Pleadings: After the pleadings are closed but within such time as not to delay the taking of evidence, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 51, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 51.

RULE 48. FINDINGS BY THE COURT

In all actions tried on the facts, the Court shall find the facts and state separately its conclusions of law and direct the entry of an appropriate judgment. The Court may adopt the Commissioner's report, including conclusions of fact and of law, or may modify it, or may reject it in whole or in part, or may direct the Commissioner to receive further evidence, or may refer the case back to him with instructions. Due regard shall be given to the opportunity of the trial Commissioner to judge of the credibility of the witnesses, and the findings of fact made by the Commissioner will be presumed to be correct.

RULE 49. DISMISSAL OF ACTIONS

* * *

(c) Insufficiency of Evidence: (1) Promptly after the plaintiff has completed the presentation of his evidence, the defendant may by motion to the Commissioner ask for a dismissal of the action by the Court on the ground that upon the facts and the law the plaintiff has not shown a right to recover: * * * (3) if, upon a consideration of the motion

and the opposition thereto, the Commissioner is convinced that the motion should be granted by the Court, he shall so state in his ruling on the motion * * * the Commissioner shall make and file his findings of fact material to the issues raised by the motion and his recommendation for conclusions of law thereon. * * * Thereafter, all proceedings shall be the same as in a case where a Commissioner's report is filed upon the entire evidence produced by both parties. * * *

RULE 53., REHEARING; AMENDMENT OF JUDGMENTS: NEW TRIALS

* * *

(c) Time for Motion: * * * a motion for a rehearing or a motion to alter or amend a judgment or a motion to grant a new trial shall be filed not later than 30 days after the entry of the judgment.

APPENDIX II

Federal Rules of Civil Procedure

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS

* * * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party, * * * If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

RULE 41. DISMISSAL OF ACTIONS

* * * *

(b) Involuntary Dismissal: Effect Thereof. * * * After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evi-

dence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

RULE 52. FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion of memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

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